

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 30 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0378-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
THOMAS CHARLES HENRY,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053759

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Ronald Zack, PLC
By Ronald Zack

Tucson
Attorney for Petitioner

ESPINOSA, Judge.

¶1 Petitioner Thomas Henry seeks review of the trial court's order denying his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged multiple claims of ineffective assistance of counsel. "We will not

disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Henry has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Henry was convicted of numerous offenses arising out of a home invasion. The trial court imposed aggravated and presumptive sentences totaling fifty-six years’ imprisonment. This court affirmed his convictions and sentences on appeal. *State v. Henry*, No. 2 CA-CR 2006-0208 (memorandum decision filed Mar. 27, 2008). After Henry unsuccessfully petitioned the supreme court for review, our mandate issued on December 16, 2008.

¶3 On October 19, 2009, Henry filed a petition for post-conviction relief through counsel, and shortly thereafter, a supplemental, pro-se petition as well. In the petition filed by counsel, Henry claimed trial counsel had been ineffective in (1) failing to object to alleged prosecutorial misconduct during closing arguments; (2) ineffectively cross-examining a witness about statements made by a victim who had identified Henry; (3) failing to cross-examine three law enforcement officers; (4) failing to conduct a *Dessureault*¹ hearing; (5) failing to investigate telephone calls made by a jailed third party that may have contained exculpatory evidence; (6) informing Henry’s wife that he was tired of Henry and would not “work hard” on his case; and (7) waiving error relating to a sleeping juror. He also argued appellate counsel had been ineffective in failing to argue certain issues adequately. In his pro se petition, he essentially argued his sixth amendment right to counsel had been violated because of an allegedly irreconcilable conflict with trial counsel.

¹*State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969).

¶4 From the record before us, it appears the trial court treated Henry’s filings as a timely-filed but combined Rule 32 notice and petition and denied relief, concluding Henry had failed to state a colorable claim on any of his allegations of ineffective assistance, either because counsel’s performance had not been deficient or because Henry could not establish prejudice. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (“To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.”); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to present colorable claim of ineffective assistance of counsel, defendant must show counsel’s performance deficient and prejudiced defense). The court also concluded the claim raised in Henry’s supplemental brief was precluded because it had been raised and adjudicated on direct appeal.

¶5 On review, Henry expressly abandons his claims relating to counsel’s alleged comments to his wife and to the sleeping juror, as well as his claim of irreconcilable conflict with counsel. He challenges the trial court’s rejection of his remaining claims, reiterating many of the arguments he made below and arguing the court had wrongly attributed some of counsel’s actions to tactical decisions.

¶6 As a threshold matter, although the trial court found Henry had filed a timely notice of post-conviction relief, the record before us does not contain such a notice or otherwise establish that Henry commenced his Rule 32 proceeding within thirty days after the mandate in his direct appeal issued, as required by Rule 32.4(a). Indeed, as noted above, his petition was filed approximately ten months after this court’s mandate issued. Thus, because Henry has not explained how his claims are exempt from the applicable time limits, either in a notice or otherwise, the court could have denied relief

solely on the basis of untimeliness. *See id.* (“Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).”).

¶7 Furthermore, even if Henry’s post-conviction relief proceedings had been timely, we cannot say the trial court abused its discretion in denying his petition. The court clearly identified the claims Henry had raised and resolved them correctly in a thorough, well-reasoned minute entry, which we adopt. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court correctly rules on issues “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court[’s] rehashing the trial court’s correct ruling in a written decision”). Therefore, although we grant the petition for review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge